(3)

No. 89-542

In the Supreme Court of the United States

OCTOBER TERM, 1989

RUDY PERPICH, GOVERNOR OF MINNESOTA, ET AL.,
PETITIONERS

v.

DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ANTHONY J. STEINMEYER
DEBORAH RUTH KANT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Montgomery Amendment, 10 U.S.C. 672(f), which prohibits a State's governor from withholding consent to a National Guard unit's being ordered to active duty outside the United States on the ground that the governor objects to the location, purpose, type, or schedule of that duty, is a constitutional exercise of Congress's power under the Army Clause, U.S. Const. Art. I, § 8, Cl. 12.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-542

RUDY PERPICH, GOVERNOR OF MINNESOTA, ET AL., PETITIONERS

v.

DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. A1-A62) is reported at 880 F.2d 11. The opinion of the panel (Pet. App. A63-A141), which was vacated by the court of appeals en banc (Pet. App. A62.1), is unreported. The opinion of the district court (Pet. App. A141-A153) is reported at 666 F. Supp. 1319.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1989. The petition for a writ of certiorari was

filed on September 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1933, Congress established the "dual-enlistment system" for the National Guard. Under this system, each National Guardsman enlists simultaneously in two distinct organizations: (i) the Army or Air National Guard of a particular State, each of which is a part of the organized militia of that State (see 32 U.S.C. 101(3)-(4), 101(6), 304) and (ii) the Army or Air National Guard of the United States, each of which is a reserve component of the national armed forces (see 10 U.S.C. 101(11), 261, 3261, 8261; 32 U.S.C. 101(5) and (7)).[1] The National Guard of the United States (NGUS) is a wholly federal organization; when serving on active duty, NGUS personnel are relieved from duty in their respective state National Guards. 32 U.S.C. 325.

Congress has prescribed the situations in which members of the NGUS may be ordered to active duty. *E.g.*, 10 U.S.C. 672-675. For instance, in the event of a war or a national emergency declared by Congress, federal authorities may order any NGUS unit to active duty (other than for training) for the duration of the war or emergency and for six months thereafter. 10 U.S.C. 672(a).

This case involves units ordered to active duty under 10 U.S.C. 672(b) and (d). Under 10 U.S.C. 672(b), a unit of the NGUS may be ordered to active duty for any purpose, with the consent of the governor of the State from

[1] The history that led up to the adoption of this system is summarized in Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940).

which that unit comes, for up to 15 days a year.[2] Under 10 U.S.C. 672(d), any member of the NGUS may be ordered to active duty indefinitely, with his consent and the consent of the governor of the State of whose National Guard he is a member.[3]

In 1986, after several governors expressed opposition to the Administration's Central American policy and indicated that they would withhold their consent to NGUS training missions in that region, Congress enacted the Montgomery Amendment, 10 U.S.C. 672(f). This provision prohibits a governor from withholding consent to an NGUS unit's active duty outside the United States because of any objection to the location, purpose, type or schedule of that duty (10 U.S.C. 672(f)):

[2] Section 672(b) provides:

> At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State or Territory or Puerto Rico or the commanding general of the District of Columbia National Guard, as the case may be.

[3] Section 672(d) provides:

> At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, or the District of Columbia, whichever is concerned.

> The consent of a Governor described in subsections (b) and (d) [of 10 U.S.C. 672] may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

2. Petitioners, the State of Minnesota and its governor, Rudy Perpich, commenced this action after the Secretary of Defense ordered NGUS units from Minnesota to active duty for three training missions in Central America. Pet. App. A3-A4. The complaint sought a declaratory judgment that the Montgomery Amendment violates the Militia Clause, U.S. Const. Art. I, § 8, Cl. 16; in addition to specifying Congress's powers with respect to state militias, that clause "reserv[es] to the States * * * the Authority of training the Militia according to the discipline prescribed by Congress." Pet. App. A4.[4] Petitioners also sought an injunction prohibiting federal authorities from ordering any unit of the Minnesota National Guard to active duty for training abroad without Governor Perpich's consent. *Ibid.*

The district court granted summary judgment for the federal government. Pet. App. A141-A153. The court found that the dual enlistment system is "a valid exercise of Congressional power under the Army and Necessary and

[4] The Militia Clause, a term customarily used to describe two related enumerated powers, confers authority on Congress (U.S. Const. I, § 8, Cls. 15-16):

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and]
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

Proper clauses" of the Constitution, U.S. Const. Art. I, § 8, Cls. 12, 18, and that the Militia Clause "does not inhibit this power." Pet. App. A149-A150.[5] "Because Congress' authority to provide for the National defense is plenary," the court continued, "the Militia clause also cannot constrain Congress' authority to train the Guard as it sees fit when the Guard is called to active federal service," "the gubernatorial veto found in §§ 672(b) and 672(d) is not constitutionally required," and "Congress may withdraw the veto without violating the Constitution." *Id.* at A150. The district court concluded that "Congress acted within its authority in providing for the active duty training of the Minnesota National Guard in Central America without plaintiff Perpich's consent, and plaintiffs' challenge to the Montgomery amendment's constitutionality must fail." *Id.* at A152-A153.

4. A divided panel of the court of appeals reversed. Pet. App. A63-A141. The majority of the panel–Judge Heaney and Senior Judge Fairchild, sitting by designation–held that the Montgomery Amendment "contravenes the intent of the Framers" and "violates the plain language" of the Militia Clause by encroaching upon the States' reserved power to train the militia. *Id.* at A66. The majority also ruled that the Montgomery Amendment is at odds with this Court's decisions in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), and *Cox* v. *Wood*, 247 U.S. 3 (1918); the majority read those decisions to establish that "the army power could supersede reserved state authority over the militia only when Congress had determined that there was some sort of exigency or extraordinary need to

[5] The Army Clause gives Congress the power

> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years[.]

exert federal power." Pet. App. A92. Judge Magill dissented. *Id.* at A123-A141.

5. Acting en banc, the court of appeals granted rehearing, vacated the panel's decision, and affirmed the district court's decision. Pet. App. A1-A62.1. The majority of the court described the issue presented by the parties' positions as follows: "when the State claims a right to control Militia training, and Congress claims 'We're training the Army, not the Militia,' who wins?" *Id.* at A9. It resolved that question in favor of federal authority, noting that "[t]he authority given to Congress by the army clause is plenary and exclusive." *Ibid.* Like the district court, the majority of the court of appeals determined that the dual-enlistment system–and the authority conferred on federal officials to order NGUS units to active duty for training–were valid exercises of Congress's power under the Army Clause. *Id.* at A9-A10. The majority also noted that, in the *Selective Draft Law Cases*, *supra*, this Court "made clear that the army clause is not limited by the militia clause." Pet. App. A11. The majority concluded (*id.* at A13):

> Congress' army power is plenary and exclusive. The reservation to the States of authority to train the Militia does not conflict with Congress' authority to raise armies for the common defense and to control the training of federal reserve forces. The Montgomery Amendment is a constitutional exercise of Congress' army powers.

Judges Heaney and McMillian dissented. The dissenting opinion adhered to the views expressed in the panel majority opinion. Pet. App. A14-A62.

ARGUMENT

The court of appeals' decision is consistent with a recent First Circuit decision that upheld the Montgomery Amendment in the face of a constitutional challenge indistinguishable from petitioners'. *Dukakis* v. *United States Dep't of Defense*, 859 F.2d 1066 (1st Cir.) (per curiam), aff'g 686 F. Supp. 30 (D. Mass. 1988), cert. denied, 109 S. Ct. 1743 (1989). No other court has reached a different conclusion. This Court denied certiorari in *Dukakis*, and there are no circumstances that would support a different disposition of this case.

As we demonstrated in our brief in opposition in *Dukakis*,[6] and as both the First and Eighth Circuits have now held, the dual-enlistment system is a lawful exercise of Congress's authority under the Army Clause and the Necessary and Proper Clause. Moreover, in the *Selective Draft Law Cases*, *supra*, and *Cox* v. *Wood*, *supra*, which presented the question whether Congress could draft members of the state militias into the federal armed forces, this Court rejected the proposition on which petitioners rely here–that the Militia Clause limits Congress's plenary authority under the Army Clause. That resolution of the relationship between the Militia Clause and the Army Clause cannot fairly be limited to wars or other declared national "exigencies" (see Pet. 11-15), and it is dispositive of this case.[7]

---

[6] We are providing petitioners' counsel with a copy of our brief in opposition in *Dukakis*.

[7] In the *Selective Draft Law Cases*, 245 U.S. at 383, the Court stated that the authority that the Militia Clause reserves to the States "did not diminish the military power" conferred by the Army Clause or "curb the full potentiality of the right to exert it"; thus, notwithstanding the Militia Clause, Congress's power under the Army Clause is "complete to the extent of its exertion and dominant." Similarly, in *Cox* v. *Wood*,

Finally, even if it were not foreclosed by the Court's cases, the accommodation between the Militia Clause and the Army Clause that petitioners advocate would be untenable. Under petitioners' view, Congress could require units of the NGUS to fight a war abroad, a mission that is not among those for which the Militia Clause permits state militias to be used,[8] but would lack the authority to prepare and train them abroad for such an eventuality. Nothing in the language or history of the Militia Clause justifies attributing that contradictory intention to the Framers.

---

247 U.S. at 6, the Court reiterated that Congress's powers to raise and support armies and to declare war "were not qualified or restricted by the provisions of the militia clause."

In reliance on these decisions, the Fifth Circuit held that units of state national guards could be ordered to active duty in the NGUS to serve abroad in Vietnam. *Johnson* v. *Powell*, 414 F.2d 1060 (1969).

[8] Under the Militia Clause, U.S. Const. I, § 8, Cl. 15, the militia may be called forth only to "execute the Laws of the Union, suppress Insurrections and repel Invasions."

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ANTHONY J. STEINMEYER
DEBORAH RUTH KANT
Attorneys

NOVEMBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00628